Faculty of Law
University of Toronto

BORA LASKIN LAW LIBRARY
3 1761 06095187 8

CANADIAN MIGRATION LAW AND POLICY
Volume I

Prof. Audrey Macklin

Law 456H1F

Fall 2005

Draft Materials edited by E. Carasco, S. Aiken, D. Galloway and A. Macklin, with W. Creates

BORA LASKIN LAW LIBRARY
AUG 29 2005
FACULTY OF LAW
UNIVERSITY OF TORONTO

Canadian Immigration and Refugee Law – Volume 1
Table of Contents

CHAPTER ONE - INTRODUCTION

A. Introduction 1-1

B. Historical Highlights 1

C. Immigration and Women 16

Fact Sheet, Canadian Research Institute for the Advancement of Women 16

D. Immigration and Racism 19

Lisa Maria Jakubowski, "Managing Canadian Immigration: Racism, Ethnic Selectivity, and the Law" 19

E. Immigration and Economics 24

Alan G. Green & David A. Green, "The Economic Goals of Canada's Immigration Policy: Past and Present" (1999) 24

E. Immigration and Canadians Today

A. Parker and M. Mendelsohn, "Who Are We As Canadians" 35

Globus: International Affairs Poll 37

Questions 1-40

CHAPTER TWO – THEORETICAL PERSPECTIVES: LIBERAL & COMMUNITARIAN DEBATES

A. Introduction 2-1

B. Sovereignty and Jurisprudence

James Nafziger, "The General Admission of Aliens Under International Law," 1

C. Open Borders and the Role of Justice in Immigration 5
Michael Walzer, "Spheres of Justice" 6

Joseph Carens, "Aliens and Citizens: The Case for Open Borders" 20
Donald Galloway, "Liberalism, Globalism, and Immigration" 31

Michael Trebilcock, "The Law and Economics of Immigration Policy" 41

Catherine Dauvergne, "Amorality and Humanitarianism in Immigration Law" 53

Questions 63

CHAPTER THREE – STATUS

A. Introduction 3-1

B. Citizenship 1

1. Acquiring Citizenship 2

Chen v. Canada (2001) 3

Xia v. Canada [2002] 8

2. Denial and Loss of Citizenship 13

Canadian Children with Non-Citizen Parents 14

Langner v. Canada (1995) 14

Notes 16

J. Bhabha, "The Citizenship Deficit: On Being a Citizen Child" 17

B. Permanent Resident Status 23

1. Introduction 23

2. Acquiring Permanent Resident Status 23

3. Loss of Permanent Resident Status 24

Romans v. Canada (2001) 26

Canepa v. Canada (1997) 27

4. Proof of Status 35

C. Foreign National Status 35

Margaret Philp, "A One Way Ticket Out of Only Nation He Knows" (2003) 36

Richard Mackie, "Teen Facing Deportation Missed Out on New Law" (2003) 39

Questions 40

CHAPTER FOUR – CONSTITUTIONAL, ADMINISTRATIVE AND INTERNATIONAL REVIEW

A. Introduction 4-1

A. Constitutional Review 1

1. Division of Powers 2

Union Colliery of British Columbia Limited v. Bryden, [1899] AC 80 (JCPC) 2

R v. Quong Wing (1914), 49 SCR 440 5

Comment on *Mangat* 12

Joseph Carens, "Immigration, Political Community, and the Transformation of Identity: Quebec's Immigration Policies in Critical Perspective" 13

2. *Charter* Issues 19

Application of the *Charter* 19

Section 7 19

Singh v. Minister of Employment and Immigration, [1985] 1 SCR 177 20

Canada (Minister of Employment and Immigration) v. Chiarelli, [1992] 1 SCR 711 27

Notes and Comments 31

Section 15

Lavoie v. Canada, [2002] 1 SCR 769 34

Notes 39

Questions 40

B. Administrative Review 41

1. Substantive Review 41

Donald Galloway, "Immigration Law" (Irwin Law), 1997 41

Pushpanathan v. Canada, [1998] 1 SCR 982 43

Comment on "Pushpanathan and Its Aftermath" 47

2. Substantive Review of Discretionary Decisions 50

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 51

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3 61

Notes 63

3. Procedural Fairness 64

Donald Galloway, "Immigration Law" (Irwin Law), 1997 64

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 66

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3 75

Notes 80

4. Institutional Independence 81

5. Mandamus and Breach of Duty 82

Dragan v. Canada (Minister of Citizenship and Immigration), [2003] FCJ no. 260 (TD) 83

C. International Review 93

1. Individual Complaints 93

Donald Galloway, "Immigration Law" (Irwin Law), 1997 93

Tahir Hussain Khan v. Canada, Communication No. 15/1994, (Committee against Torture) 96

2. Reports 107

Conclusions and Recommendations of the Committee against Torture, Canada (2000) 107

Note 110

Questions 110

CHAPTER FIVE – TEMPORARY RESIDENTS

I. Introduction 5-1

II. Temporary Residence Status – General Requirements 4

A. Temporary Intent 4

B. Dual Intent 5

C. What Rights does the holder of a temporary visa have? 6

D. Conditions on All Temporary Residents 8

III. Temporary Workers 8

A. Work Permits 8

B. International Agreements : NAFTA and GATS 9

IV. Workers in the Chronic Shortage Sector 13

Michael Walzer, *Spheres of Justice* (extracts) 14

CIC, Gender-Based Analysis Chart 21

A. Live-in Care Givers 23

L. Langevin and M. Belleau, Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live-In Care-Givers and Mail Order Brides" 23

B. Seasonal Agricultural Workers 33

"Abuses cited in model Canadian guest-worker program" 33

C. Exotic Dancers 36

Audrey Macklin, "Dancing Across Borders" 35

The Globe and Mail 46

V. Students 47

A. Introduction 47

B. Statutory Requirements 48

C. Exemptions to Study Permit 49

D. Issuance of a Study Permit 50

E. Employment and Foreign Students 51

F. Renewal of Study Permits 53

G. *Bona Fides* 53

Kim v. Canada (Minister of Citizenship and Immigration) 53

H. Judicial Deference 58

I. Breach of Conditions 58

Dinh v. Canada (Minister of Citizenship and Immigration) 58

VI. Undocumented Migrants 59

Georges Tapinos, "Illegal immigrants and the labour market" 59

Questions 5-62

Canadian Immigration and Refugee Law – Volume 2
Table of Contents

CHAPTER SIX – THE ECONOMIC CLASS

Introduction 6-1

General Requirements 2

Lock-In Date 3

Retroactivity 4

Borisova v. Canada (Minister of Citizenship and Immigration) 4

Dragan v. Canada (Minister of Citizenship and Immigration) 5

Kazi v. Canada (Minister of Citizenship and Immigration) 5

A. Skilled Worker Class

1. Definition 5

Christopher Worswick, "Immigrants' Declining Earnings: Reasons and Remedies" (2004) 6

2. National Occupation Classification Matrix 12

Nehme v. Canada (Minister of Citizenship and Immigration) 15

3. Pass Mark 19

4. Selection Criteria

1. General 21

Martin Collacott (2003) 22

Erin Tolley (2003) 22

i. Education 23

Edoshina v. Canada (Minister of Citizenship and Immigration) 24

ii. Language 24

Quines v. Canada (Minister of Citizenship and Immigration) 27

iii. Experience 27

Nakamine v. Canada (Minister of Citizenship and Immigration) 27

Dogra v. Canada (Minister of Citizenship and Immigration) 28

Andrew Brouwer (1999) 33

E. Age 45

F. Arranged Employment 45

G. Adaptability 45

5. Discretion 46

Chen v. Canada [1994] 47

6. Provincial and Territorial Nominee Class 53

B. Alberta 53

C. Prince Edward Island 54

D. British Columbia 55

B. The Business Classes 55

1. Entrepreneurs 56

David Ley (2000) 58

D. Documentation of Funds 72

E. Delegation of Authority 72

2. Investors 73

A. General 73

B. Qualifications 73

C. Source of Funds 73

3. Self-Employed Persons 74

A. General 74

B. Qualifications 74

4. Selection Criteria for Business Immigrants 74

5. Substituted Evaluation 75

IV. Live-In Caregiver Class 76

VI. Discussion Questions 6-101

CHAPTER SEVEN – THE FAMILY CLASS

Introduction

A. Who is Family? 7-2

1. Spouses/Common-Law Partners/Conjugal Partners 2

Minister of Employment and Immigration v. Resham Kaur Taggar 4

Canada (Minister of Employment and Immigration) v. Narwal 7

Bhatti v Canada [2004] 10

Macapagal v. Canada [2004] 13

"Adalah petitions" (2003) 19

a. Same Sex Relationships 20

b. Polygamous Relationships 22

c. "Immigration Marriages" 24

Horbas v. Minister of Employment and Immmigration 26

Salh v. Canada (Minister of Employment and Immigration) 28

2. Children 32

De Guzman v. Minister of Citizenship and Immigration 2004 33

a. Adopted Children 43

Adoption and Sponsorship: Characteristics of *Bona Fide* Foreign Adoptions 43

Cheema (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration) 46

Frounze v. Canada 52

Questions 57

B. Sponsorship

1. General Requirements 57

Audrey Macklin, "Public Entrance/Private Member" 59

Fortaleza v. Canada [2005] 64

2. Women sponsored by husbands/partners 68

Colleen Sheppard, "Women as Wives: Immigration Law and Domestic Violence" 68

3. Sponsored Immigrants and Social Assistance 76

Michael Trebilcock, "The Law and Economics of Immigration Policy" 76

RETHINKING IMMIGRATION POLICIES

A. Independent Applicants 76

B. Family Preference Immigration 79

The mandatory insurance proposal in context 79

Questions 7- 81

CHAPTER EIGHT – REFUGEES: THE INTERNATIONAL CONTEXT

A. Introduction

1. Facts and Figures 8-1

Tables

1. Persons of Concern to the UNHCR 2003 2

2. Refugee Claims Filed 1994-2002 Canada and Other Refugee - Receiving Countries 3

2. Religious and Ethical Origins of the Concept of Asylum 4

Karen Musalo, Jennifer Moore & Richard Boswell, *Refugee Law and Policy: Cases and Materials* 4

B. History Leading Up to the Refugee Convention 10

L. Barnett, "Global Governance and the Evolution of the International Convention" 10

1951 Convention Relating to the Status of Refugees 12

"Convention Refugee Definition" – James Hathaway Excerpt 12

OAU Definition 15

C. The *Non-Refoulement* Obligation 15

1. The History and Development of Non-refoulement 15

Dent and Hathaway, *Refugee Rights* 16

2. Non Entrée Mechanisms

Amnesty International Canada 21

Joanne Van Selm, "Access to Procedures" 22

Stephen Knight , "Defining Due Process Down" 27

"Canada/US Safe Third Country Agreement" 32

D. Beyond the Convention Definition

1. Migratory Movements

Michael Oliver,
The Movement of Peoples: A View from the South 33

2. Globalization and International Migration

Helene Pellerin, "Global Restructuring in the World Economy and Migration" 34

3. Gender Persecution

Judith Kumin, "Gender Persecution in the Spotlight" 38

E. Role of the UNHCR 40

Tim Wichert, "Pursuing Social Policy Ideals at the International Level" 41

Michael Barnett, "Humanitarianism With a Sovereign Face" 44

F. Canada and Refugees 47

Canadian Council for Refugees, "Refugees Worldwide" 49

CCR, "State of Refugees in Canada" 52

Rousseau et al., "The complexity of Determining Refugeehood: .... (2002) 54

Sharryn Aiken, "Of Gods and Monsters" 60

Inter-American Commission on Human Rights,
Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System 64

Diane Francis, *Immigration: The Economic Case* 70

G. Peering Into The Future

UNHCR, "A Timeless Treaty Under Attack:
Reconsidering the Convention" 75

Jeff Crisp, "A New Asylum Paradigm" 77

Richard Black, "Putting Refugees in Camps" 80

Questions 8-84

CHAPTER NINE – THE CANADIAN INTERPRETATION OF THE REFUGEE DEFINITION

A. Introduction 9-1

B. Eligibility to Make a Protection Claim 3

C. Chart of Refugee Protection Determination Process 5

D. The Refugee Protection Hearing 6

E. Elements of the Refugee Definition 7

1. The refugee claimant must be outside his/her national state/place of habitual residence 7

2. The refugee claimant must have a fear of persecution 9

a. Interpretation of Persecution 9

Deborah Anker, "Refugee Law, Gender and the Human Rights Paradigm" 11

b. Persecution and Discrimination 13

c. Persecution and Prosecution 13

d. Persecution that is Cumulative 15

e. Persecution in the Context of Civil War 16

f. Agents of Persecution 18

Canada v. Ward [1993] 18

ECRE, "Position on the Interpretation of Art. 1" 25

g. Gender-Based Persecution 25

Chantal Tie, "Sex, Gender, and Refugee Protection in Canada under Bill C-11" 27

3. Well-Founded Fear 36

4. Grounds of Persecution 38

a. Race 39

b. Nationality 39

c. Religion 40

d. Membership in a Particular Social Group 42

Ward Excerpt 43

Comment on *Ward* by Alexander Aleinikoff 48

e. Political Opinion 50

Ward Excerpt 51

5. Unable or Unwilling to Avail him/herself of national State's Protection ..... .55

Ward Excerpt 55

a. Internal Flight Alternative 57

F. Exclusion Clauses 60

1. Article 1E 60

2. Article 1F 61

UNHCR, Application of the Exclusion Clauses (2003) 62

3. Procedural Issues

James Sloan, "The Application of Article 1F" (2000) 65

Pushpanathan v. Canada [1998] 70

G. Cessation Clauses 75

H. Consolidated Grounds 77

Li v. Canada [2005] 77

Questions 9-90

CHAPTER TEN – SOVEREIGNTY AND BORDER CONTROL

A. Introduction 10-1

B. The Enforcement Context

1. Immigration Enforcement, Sovereignty and Refugee Determination 2

Reg Whitaker, "Refugees: The Security Dimension" 2

Sharryn Aiken, "Of Gods and Monsters" 21

2. Immigration Enforcement and International Relations 27

3. Immigration Enforcement, Security and the United States 27

"The Canada-U.S. Smart Border Declaration" (from Department of Foreign Affairs webpage) 27

"Canada's Actions Against Terrorism Since September 11" (Department of Foreign Affairs) 29

Notes 35

4. Organized Crime, Human Trafficking and People Smuggling

Protocol to Prevent, Suppress and Punish Trafficking in Persons 36

Protocol Against the Smuggling of Migrants by Land, Sea and Air 41

Questions 10-47

CHAPTER ELEVEN – ENFORCEMENT

I. Inadmissibility and Removal

A. Determining Inadmissibility 11-1

1. Criteria of Inadmissibility 2

a. Health Grounds 2

Deol v. Canada, [2003] 1 FC 301 (CA) 3

Note on Excessive Demand 7

Lisa Priest, "HIV Test Used to Bar Potential Immigrants" 8

Canadian HIV/AIDS Legal Network,

"Is Mandatory HIV Testing of Immigrants and Refugees Justified?" 9

b. Criminality 13

Li v. Canada (Minister of Citizenship and Immigration), [1997] 1 FC 235 (CA) 13

Canada (Minister of Citizenship and Immigration) v. Saini, [2002] 1 FC 200 19

Note on Rehabilitation 27

c. Organized Criminality 27

Chiau v. Canada (Minister of Citizenship and Immigration), [2001] 2 FC 297 (CA) 27

Notes 34

d. Security 35

e. Other Grounds of Inadmissibility 35

C. Removal Orders

1. Types of Order 36

2. Stays of Removal Orders 37

3. Pre-Removal Risk Assessment (PRRA) 37

Questions 37

II. Security Certificates, Danger Opinions, Withholding Evidence and Detention

A. Security Certificates and Danger Opinions 40

1. Security Certificates 40

B. Danger Opinions 41

1. Eligibility 41

2. Refoulement 41

Suresh v. Canada 41

Colin Freeze, "Powerful Antiterror Tool Rarely Employed by Ottawa" 57

"How Nations deal with foreign terrorist suspects" (2004) 58

B. Withholding Evidence 60

Sogi v. Canada (Minister of Citizenship and Immigration), [2003] FCJ no. 1836 60

C. Detention 63

Almrei v. Canada [2004] 64

Notes 73

CCR Brief on Bill C-11 (extract) 73

IRB Chairperson's Guidelines on Detention 74

IACHR Report on Canada (2000) 79

Canada v. Zhang [2001] 4 FC 173 88

Questions 11-91